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Appendix A: Reporting requirements index

The Australian Crime Commission Board Chair Annual Report is produced in compliance with section 61 of the *Australian Crime Commission Act (2002)*.

Section of the ACC Act	Reference in this report
<p>Section 61(2) (a)</p> <p>a description of any investigation into matters relating to federally relevant criminal activity that the ACC conducted during the year and that the Board determined to be a special investigation</p>	Chapter 2: Description of activities
<p>Section 61(2) (b)</p> <p>a description, which may include statistics, of any patterns or trends, and the nature and scope, of any criminal activity that have come to the attention of the ACC during that year in the performance of its functions</p>	Chapter 3: Identified criminal activity
<p>Section 61(2) (c)</p> <p>any recommendations for changes in the laws of the Commonwealth, of a participating State or of a Territory, or for administrative action, that, as a result of the performance of the ACC's functions, the Board considers should be made</p>	Appendix B: Recommendations for legislative change
<p>Section 61(2) (d)</p> <p>the general nature and the extent of any information furnished by the CEO during that year to a law enforcement agency</p>	Chapter 2: Description of activities
<p>Section 61(2) (e)</p> <p>the extent to which investigations by the ACC have resulted in the prosecution in that year of persons for offences</p>	Appendix C: Court proceedings
<p>Section 61(2) (ea)</p> <p>the extent to which investigations by the ACC have resulted in confiscation proceedings</p>	Appendix C: Court proceedings
<p>Section 61(2) (g)</p> <p>particulars of the number and results of:</p> <p>(ii) applications made to the Federal Court or the Federal Circuit Court under the <i>Administrative Decisions (Judicial Review) Act 1977</i> for orders of review in respect of matters arising under this Act</p> <p>(iii) other court proceedings involving the ACC</p> <p>being applications and proceedings that were determined, or otherwise disposed of, during that year.</p>	Appendix C: Court proceedings

Appendix B: Recommendations for legislative change

Prevention is a key element of the Australian Crime Commission's response to serious and organised crime. Through recommending policy and legislative change, the Australian Crime Commission Board can inform and influence Commonwealth, state and territory government decisions as part of a holistic response to serious and organised crime.

In April 2014, the Australian Crime Commission Board appeared before the Senate Standing Committees on Legal and Constitutional Affairs References Committee Inquiry into the Comprehensive Revision of the *Telecommunications (Interception and Access) Act 1979*.

The Board's collective position has been to support uniform retention of telecommunications data to assist national law enforcement to respond to serious and organised crime.

In addition to the Board's appearance before the Committee, the Board endorsed a series of case studies highlighting cases where access to telecommunications data has assisted an investigation, or where a lack of access has hindered an investigation. These are available on the Australian Crime Commission website.

The Board was also briefed on the Australian Crime Commission's classified and unclassified submissions to the committee (in March 2014), as well as the agency's appearance at the public hearing.

Throughout the year, the Australian Crime Commission Board was also informed about the agency's role in providing submissions to a number of committees, reviews and inquiries throughout 2013–14, including:

- Senate Legal and Constitutional Affairs References Committee, Crimes Legislation Amendment (Unexplained Wealth and Other Measures) Bill 2014
- Parliamentary Joint Committee on Law Enforcement, Inquiry into financial related crime
- Commonwealth review of Australia's anti-money laundering/counter-terrorism financing (AML/CTF) regime
- Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, Inquiry into the jurisdiction of the Australian Commission for Law Enforcement Integrity

- Review of the *Freedom of Information Act 1982* and the *Australian Information Commissioner Act 2010*
- Victorian Parliamentary Inquiry into the supply and use of methylamphetamines, particularly ice, in Victoria.

Minor amendments to the ACC Act

Consequential amendments to the ACC Act came into effect on the commencement of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (12 March 2014) and the *Public Governance, Performance and Accountability Act 2013* (1 July 2014, just after the reporting period). These did not alter the powers or functions of the Australian Crime Commission.

Appendix C: Court proceedings

Prosecutions

During 2013–14, Australian Crime Commission-related court results included convictions for offences such as illicit drug offences, fraud and deception, weapons and explosives offences, theft, money laundering and ACC Act offences. The Australian Crime Commission achieved these results by working closely with its partners.

The following information presents court results grouped by severity of sentence. The sentence used for categorising cases is the total maximum sentence liable to be served for all the Australian Crime Commission-related charges in that case, as finalised in the financial year. The offence type listed is a broad category that is indicative of the offences charged, based on the Australian and New Zealand Standard Classification Office. It is not intended to be exhaustive.

Where a matter has several results, all convictions are represented by the head sentence and other withdrawn or dismissed results are listed.

Court results

	Offence	Outcome
1	Theft and related offences (proceeds of crime and money laundering) Illicit drug offences	Custodial sentence 10 years or more
2	Illicit drug offences	Custodial sentence 10 years or more
3	Illicit drug offences	Custodial sentence 10 years or more
4	Theft and related offences (proceeds of crime and money laundering) Illicit drug offences	Custodial sentence of six years – less than 10 years
5	Theft and related offences (proceeds of crime and money laundering) Illicit drug offences	Custodial sentence of six years – less than 10 years
6	Fraud, deception and related offences	Custodial sentence of six years – less than 10 years
7	Illicit drug offences	Custodial sentence of six years – less than 10 years
8	Illicit drug offences	Custodial sentence of six years – less than 10 years
9	Illicit drug offences	Custodial sentence of six years – less than 10 years
10	Illicit drug offences	Custodial sentence of six years – less than 10 years
11	Illicit drug offences	Custodial sentence of six years – less than 10 years
12	Illicit drug offences	Custodial sentence of six years – less than 10 years

Court results (continued)

	Offence	Outcome
13	Illicit drug offences	Custodial sentence of six years – less than 10 years
14	Illicit drug offences	Custodial sentence of six years – less than 10 years*
15	Fraud, deception and related offences	Custodial sentence of three years – less than six years
16	Illicit drug offences	Custodial sentence of three years – less than six years
17	Illicit drug offences	Custodial sentence of three years – less than six years
18	Illicit drug offences	Custodial sentence of three years – less than six years
19	Illicit drug offences	Custodial sentence of three years – less than six years
20	Illicit drug offences	Custodial sentence of three years – less than six years
21	Illicit drug offences	Custodial sentence of three years – less than six years
22	Illicit drug offences	Custodial sentence of three years – less than six years
23	Illicit drug offences Illicit drug offences	Custodial sentence of three years – less than six years Withdrawn / Dismissed / Acquitted
24	Theft and related offences (proceeds of crime and money laundering)	Custodial sentence of less than three years
25	Theft and related offences (proceeds of crime and money laundering)	Custodial sentence of less than three years
26	Theft and related offences (proceeds of crime and money laundering)	Custodial sentence of less than three years
27	Theft and related offences (proceeds of crime and money laundering)	Custodial sentence of less than three years
28	Theft and related offences (proceeds of crime and money laundering) Illicit drug offences	Custodial sentence of less than three years Non-custodial Sentence
29	Fraud, deception and related offences Fraud, deception and related offences Illicit drug offences	Custodial sentence of less than three years Withdrawn / Dismissed / Acquitted Withdrawn / Dismissed / Acquitted
30	Illicit drug offences	Custodial sentence of less than three years
31	Illicit drug offences	Custodial sentence of less than three years
32	Illicit drug offences	Custodial sentence of less than three years

Court results (continued)

	Offence	Outcome
33	Illicit drug offences	Custodial sentence of less than three years
34	Illicit drug offences	Custodial sentence of less than three years
35	Illicit drug offences	Custodial sentence of less than three years
36	Illicit drug offences Prohibited and regulated weapons and explosives offences	Custodial sentence of less than three years
37	ACC Act offences	Custodial sentence of less than three years
38	ACC Act offences	Custodial sentence of less than three years
39	Theft and related offences (proceeds of crime and money laundering) Illicit drug offences	Non-custodial sentence
40	Illicit drug offences	Non-custodial sentence

Note: People charged in a financial year may not have appeared before a court by 30 June of that year, and convictions may be for people charged in previous financial years.

*This matter was dealt with in an international jurisdiction, based on information provided by the Australian Crime Commission to the New Zealand authorities.

Also during the year charges for three fraud, deception and related offences and three ACC Act offences were either withdrawn, dismissed or acquitted.

Confiscations

During 2013-14 the Australian Crime Commission, in conjunction with its partners, achieved:

- \$150 million proceeds of crime restrained
- \$94.14 million proceeds of crime forfeited (forfeitures coming to \$82 747 667 and pecuniary penalty orders issued to \$11.4 million)

No pecuniary penalty orders were recovered.

Appendix D: Judicial decisions

The Australian Crime Commission's actions are often reviewed by courts. This may occur in the context of applications in the Federal Court for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or section 39B of the *Judiciary Act 1903*, or as part of the criminal justice process, such as in a contested subpoena or application for a stay of criminal proceedings.

In 2013–14, the Crime Commission was involved in a range of matters including prosecutions where the grounds for stay applications were claims that the conduct of agency examinations and dissemination of examination material adversely affected the accused's right to a fair trial, or the proper administration of justice.

X7

X7 v ACC and Commonwealth of Australia (No. S100 of 2012) was an application in the original jurisdiction of the High Court for declaratory and injunctive relief. The background to the case was the examination of the plaintiff by an Australian Crime Commission Examiner after he had been charged with serious criminal offences. The plaintiff sought a declaration that, to the extent the ACC Act permits a coercive hearing of a person charged, it is unconstitutional, and sought injunctions restraining the Australian Crime Commission from examining X7 before his criminal charges were finalised.

The plaintiff argued that it is unconstitutional for the Legislature to vest in the executive a power, which in his argument, should rightly reside with the judiciary alone. Further, he argued that once a person is charged with a serious criminal offence, the executive cannot conduct a coercive hearing in respect of those charges because to do so would fundamentally interfere with the interests of justice.

On 26 June 2013, a majority of the High Court held that as a matter of statutory construction the ACC Act did not authorise an Examiner to require a person charged with an indictable Commonwealth offence to answer questions about the subject matter of the offence. The majority of the Court did not consider the constitutional arguments raised. The Australian Crime Commission has adjusted its practices to abide by the majority's decision and has undertaken steps to ensure that issues associated with prior examinations have been reviewed and appropriately addressed/managed.

CB

On 30 June 2011, the District Court in New South Wales granted a permanent stay of the trial of an accused (referred to as CB) on a charge of conspiracy to manufacture a commercial quantity of a controlled drug, contrary to section 11.5 and 305.3 of the *Criminal Code Act 1995*.

The basis of the judge's decision was that after the accused was charged, he was summonsed and examined by the Australian Crime Commission about the subject matter of the charge pending against him, and that holding an examination in the circumstances interfered with the criminal trial process. The Commonwealth Director of Public Prosecutions appealed the primary judge's decision to grant a permanent stay of the CB's trial.

The Court of Criminal Appeal, in an unpublished judgment, allowed the appeal, finding that there had been no interference with the administration of justice. CB sought special leave to appeal against the decision to the High Court, but on 22 June 2012 that leave was refused. CB then commenced proceedings in the original jurisdiction of the High Court (*CB v Australian Crime Commission & Anor, s297/2012*) and those proceedings (and the criminal trial) were halted to await the decision of the Court in X7. Following the High Court's decision in X7, CB unsuccessfully applied to re-open this Special Leave application.

On 12 December 2013, their Honours indicated that the Criminal Court of Appeal decision was not affected by the subsequent decision in X7 and there was no question warranting the re-opening of the appeal.

R v Seller and R v McCarthy

In the matters of *R v Seller and R v McCarthy*, heard together in the Supreme Court of New South Wales, the defendants were charged with fraud and corruption offences. The defendants sought, and were granted, a permanent stay of the criminal trials on the grounds that their right to conduct their defence was compromised by the dissemination of the transcripts of Australian Crime Commission examinations to the Commonwealth Director of Public Prosecutions, claiming that the circumstances of the case brought the system of justice into disrepute and constituted an abuse of the processes of the court. With leave of the Court, the agency argued that derivative use of examination material is permitted under the ACC Act, and there can be no interference with the course of justice as all examinations took place before charge. Judgment in favour of the defendants was handed down on 17 August 2012.

The Commonwealth Director of Public Prosecutions appealed the decision, and on 1 March 2013 the New South Wales Court of Criminal Appeal delivered judgment in favour of the Commonwealth. The Court found that a stay of proceedings should only be granted in the most extreme cases, and where there is prejudice the trial judge will be able to remedy it in most cases by excluding evidence.

On 2 April 2013, Seller and McCarthy both filed applications for leave to appeal to the High Court, claiming that the New South Wales Court of Criminal Appeal mistakenly re-instated the proceedings. Counsel for both Seller and McCarthy sought to rely on X7 in support of the notion that disclosure of the examination transcripts to the Commonwealth Director of Public Prosecutions constituted such an inroad into the accusatorial process that it amounted to actual prejudice and warranted a stay of prosecution. The Court rejected these arguments, finding that the New South Wales Court of Criminal Appeal was not in error when it concluded that there was no evidence that the trial would suffer a fundamental defect warranting a stay, and there was no point of legal principle arising which would warrant the consideration of the High Court. The two applications were dismissed.

The trials will resume in late 2014, and further arguments are expected to be heard in relation to the use and communication of Australian Crime Commission examination material.

Bartlett, Sayers and Grace and Dunn

The prosecution of Bartlett, Sayers and Grace and Dunn was a prosecution arising from the Wickenby investigation and, like the Seller and McCarthy proceedings, raised issues of derivative use of ACC Act examination information and prosecutorial disclosure of examination material prior to charge.

In a pre-trial application three of the defendants applied for a stay of their prosecutions. Initially they relied on the same arguments as Seller and McCarthy, asserting that the non-publication direction permitted disclosure to the prosecution that prejudiced the fairness of their trial. They further argued that the High Court's decision in X7 was equally applicable to a case where a person may be charged with an offence and therefore the Australian Crime Commission examinations should not have proceeded.

On 15 August 2013, Heenan J of the Supreme Court of Western Australia dismissed the applications for a permanent stay of the prosecutions of each of the accused in his decision of *Bartlett v The Queen* [No. 6] (2013) WASC 304. His Honour held that it was the absence of any reference to any tangible evidence or any use of particular evidence as a form of potential prejudice that left the applicants' submissions without foundation. Dunn was subsequently convicted, Grace was acquitted, and the jury was unable to reach a verdict in relation to Bartlett and Sayers. The trials resumed early in 2014.

Lee⁵

While not an Australian Crime Commission matter, the recent High Court decision of Lee has potential implications for the way the agency conducts coercive examinations of persons who have not been charged.

This matter involved the pre-trial examination of the two appellants by the New South Wales Crime Commission under the *New South Wales Crime Commission Act 1985* (NSW). The appellants were subsequently charged and convicted with drug supply, firearm and money laundering offences. At examination, the questioning traversed matters connected with the offences with which the appellants were subsequently charged. In preparing for the trial of the appellants, the Office of the Director of Public Prosecutions (NSW) requested the examination transcripts from the New South Wales Crime Commission on the basis that the examination material may disclose a possible defence(s) and would therefore be useful to the prosecution.

In the High Court, the appellants appealed their convictions for drug and firearm offences. On 21 May 2014, in a unanimous judgment, the High Court held that the appellants had not received a fair trial because confidential transcripts of their compulsory examinations before the New South Wales Crime Commission had been unlawfully given to Office of the Director of Public Prosecutions (NSW) to assist it to prepare the prosecution's case. The prosecution conceded that, in the circumstances of the particular case, the disclosure to the prosecution was unlawful, and the High Court held that this was a fundamental departure from the requirements of the accusatorial trial and resulted in a miscarriage of justice.

Contempt of the Australian Crime Commission

The Australian Crime Commission's powers to refer a witness for contempt were introduced into the ACC Act in February 2010. Examiners have the power to apply for a witness to be dealt with for contempt of the agency in certain circumstances. These applications are heard in either the Federal Court or relevant state or territory Supreme Court.

There were no finalised proceedings for contempt of the ACC in 2013–14. The ACC has two contempt matters which were before the courts at the time of writing this report. Both of these matters involve charges for contempt under section 34(a)(ii) of the ACC Act.

5 *Lee v New South Wales Crime Commission* (2013) 302 ALR 363; [2013] HCA 39.

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